

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D21042  
Y/kmg

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Submitted - October 15, 2008

ROBERT A. SPOLZINO, J.P.  
FRED T. SANTUCCI  
HOWARD MILLER  
THOMAS A. DICKERSON  
RANDALL T. ENG, JJ.

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2007-07269

DECISION & ORDER

Mid-Hudson Co-Operative Insurance Co., etc.,  
et al., respondents, v Kingston Fire Equipment,  
Inc., et al., defendants, Morgan Fuel & Heating  
Co., Inc., d/b/a Bottini Fuel, appellant.

(Index No. 4599/05)

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Wichler & Gobetz, P.C., Suffern, N.Y. (Kenneth C. Gobetz of counsel), for appellant.

Alan R. Lewis, Newburgh, N.Y. (John G. Caulfield of counsel), for respondents.

In an action to recover damages for injury to property due to a fire, the defendant Morgan Fuel & Heating Co., Inc., d/b/a Bottini Fuel, appeals from an order of the Supreme Court, Dutchess County (Brands, J.), dated July 5, 2007, which denied its motion to vacate its default in answering the complaint.

ORDERED that the order is affirmed, with costs.

The Supreme Court did not improvidently exercise its discretion in denying the appellant's motion to vacate its default in answering the complaint. While CPLR 317 permits a defendant who has been "served with a summons other than by personal delivery" to seek relief from a default upon a showing that it did not receive notice of the summons in time to defend and has a meritorious cause of action (*see* CPLR 317; *Taieb v Hilton Hotels Corp.*, 60 NY2d 725; *Franklin v 172 Aububon Corp.*, 32 AD3d 454; *Brockington v Brookfield Dev. Corp.*, 308 AD2d 498; *Samet*

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MID-HUDSON CO-OPERATIVE INSURANCE CO. v KINGSTON FIRE EQUIPMENT, INC.

*v Bedford Flushing Holding Corp.*, 299 AD2d 404, 405), the affidavit of the appellant's president herein fell short of establishing the appellant's entitlement to such relief.

SPOLZINO, J.P., SANTUCCI, MILLER, DICKERSON and ENG, JJ., concur.

ENTER:

A handwritten signature in cursive script that reads "James Edward Pelzer".

James Edward Pelzer  
Clerk of the Court